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UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

LILY JEUNG, AMY SAYERS, and
DARREN WALCHESKY, on behalf
of themselves and all other similarly
situated,

Plaintiffs

vs.

YELP INC.,

Defendant.

CASE NO. 2:14-CV-06223-FMO-
AS(x)

YELP INC'S MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM
PURSUANT TO RULE 12(b)(6) AND
TO STRIKE CLASS ALLEGATIONS
UNDER RULE 12(f);
MEMORANDUM OF POINTS AND
AUTHORITIES

[Filed concurrently with Notice of
Motion; Declaration of Adrianos
Facchetti; Proposed Order]

Date: December 18, 2014

Time: 10:00 a.m.

Place: 22-5th Floor

Judge: Hon. Fernando M. Olguin

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1 **I. INTRODUCTION**

2 With the rise of the Internet as a tool for expression and commerce, websites
3 have proliferated to give hundreds of millions of people ways to express
4 themselves in unprecedented ways. Online users can spread news on Twitter, post
5 job listings on Craigslist, review books on Amazon, or share consumer experiences
6 on Yelp—reaching a far more vast audience for their content than ever
7 before. Plaintiffs here threaten to upend these innovative services with the
8 outrageous claim that anyone who posts something on the Internet becomes an
9 employee of the online forum in which it is posted, and is therefore entitled to
10 compensation. Under Plaintiffs' theory, popular websites like Amazon, eBay,
11 Facebook, Google, and Twitter would suddenly gain hundreds of millions of
12 employees, all entitled to billions of dollars in payment by the mere fact that they
13 have used these online forums to express themselves through content contributions.
14 Anyone would become an employee of a website merely through the act of posting
15 content to it. Plaintiffs' theory is meritless, but if legitimized by this Court would
16 endanger the public's access to free online forums.

17 Plaintiffs assert that they are entitled to compensation under the Fair Labor
18 Standards Act ("FLSA") because they used Yelp's website to publish their
19 reviews, photos, and other content contributions online—even though, as alleged,
20 Plaintiffs never expected to be paid, Yelp never agreed to pay Plaintiffs, and
21 Plaintiffs derived valuable benefits from the use of Yelp's free services.

22 Indeed, Plaintiffs have never been employees of Yelp, and the Complaint's
23 sparse and meandering allegations fail to establish the existence of any
24 employer/employee relationship between Plaintiffs and Yelp. Accordingly,
25 pursuant to Rule 12(b)(6), this Court should dismiss Plaintiffs' First Cause of
26 Action claiming a violation of the FLSA.

27 In addition, pursuant to Rule 12(f), Plaintiffs' purported class action
28 allegations should be stricken because Plaintiffs identify no ascertainable class in

1 their Complaint. Plaintiffs previously brought this same case in this Court, which
 2 Judge Pregerson dismissed earlier this year. This Court should dismiss it again.

3 **II. THE ALLEGATIONS AND INCORPORATED DOCUMENTS**

4 **A. Yelp Inc.**

5 Defendant Yelp Inc. (“Yelp”) owns and operates Yelp.com, a popular social
 6 networking and consumer information website, and related mobile applications
 7 (collectively “Yelp.com”), for users to share information about local communities
 8 worldwide. See Complaint ¶ 1:29-31. Yelp, among other things, provides and
 9 publishes a forum for members of the public to read and write reviews about local
 10 businesses, services, and other entities such as non-profit organizations and
 11 government agencies. *Id.* Members of the public—like the Plaintiffs—contribute
 12 reviews and rate local businesses. *Id.* Yelp averages 138 million unique visitors per
 13 month to its websites. Its users have contributed over 61 million reviews. *Id.* at
 14 1:32-33.

15 **B. Yelp’s Terms of Service And Other Written Policies**

16 Like many other websites, Yelp maintains Terms of Service (“TOS”),
 17 Content Guidelines, Frequently Asked Questions (“FAQ”), and other policy
 18 statements that set limits on how individuals may use Yelp’s Services. Complaint,
 19 ¶¶ 63-64, 66. Facchetti Decl., ¶¶ 5-8, Exhibits C-F. Users must agree to the TOS
 20 prior to contributing content to Yelp.com. *Id.*

21 The TOS make clear that Yelp users may not and will not be compensated
 22 monetarily for the content they publish to Yelp, for which Yelp obtains a license in
 23 order to be able to display such content to the public. The section titled “Our Right
 24 to Use Your Content” provides that “[Yelp] may use Your Content in a number of
 25 different ways . . . As such, you hereby irrevocably grant us world-wide, perpetual,
 26 non-exclusive, royalty-free, assignable, sublicensable, transferable rights to use
 27 Your Content for any purpose.” Facchetti Decl., ¶ 7, Exhibit E. ¶5.B. The section
 28 on “Ownership” states: “We own the Yelp Content . . . Except as expressly and

1 unambiguously provided herein, we do not grant you any express or implied rights,
 2 and all rights in and to the Site and the Yelp Content are retained by us.” *Id.*, ¶ 5.C.
 3 The section on “Advertising” states: “Yelp and its licensees may publicly display
 4 advertisements and other information adjacent to or included with Your Content.
 5 You are not entitled to any compensation for such advertisements.” *Id.*, ¶ 5.D. One
 6 of the “RESTRICTIONS” is: “You agree not to, and will not assist, encourage, or
 7 enable others to use the Site to: [¶] Violate our Content Guidelines, for example,
 8 by . . . compensating someone or being compensated to write or remove a review.”
 9 *Id.*, ¶ 6.A. i. The TOS state that Yelp may terminate user accounts at any time, and
 10 allow users to terminate their own accounts. *Id.*, ¶ 14. The TOS provide that “BY
 11 ACCESSING OR USING THE SITE, YOU REPRESENT THAT YOU HAVE
 12 READ, UNDERSTOOD, AND AGREE TO THESE TERMS, INCLUDING THIS
 13 SECTION.” *Id.*, ¶ 12.

14 **C. Yelp Elite Squad**

15 Yelp invites certain users to join the Elite Squad, a program through which
 16 Yelp recognizes certain users who frequently contribute quality content to
 17 Yelp.com. Complaint, ¶¶ 29, 31, 49, 53, 54, 64, and Facchetti Decl., Exhibit A, ¶¶
 18 16-17. Users who accept Yelp’s invitation receive access to special events that may
 19 include food and beverage tastings from local businesses, and free promotional
 20 items with Yelp branding. Facchetti Decl. ¶ 3, Exhibit A, ¶¶ 38-40.

21 In order to join the Yelp Elite, a user must agree to Yelp’s Elite Terms.
 22 Facchetti Decl ¶ 9, Exhibit G. The Elite Terms make clear that Yelp Elite members
 23 are not employees of Yelp, and that such members, or Yelp, may terminate Elite
 24 membership at any time. *Id.*

25 **D. Plaintiffs**

26 Plaintiff Sayers alleges that she is domiciled in Portland, Oregon, has written
 27 over 500 reviews for Yelp since 2006, and that she was a Yelp Elite, although Yelp
 28 later closed her user account. Complaint ¶¶ 20-22; Facchetti Decl., ¶ 3, Exhibit A,

¶ 16. Plaintiff Jeung alleges that she is domiciled in Los Angeles, California, has written approximately 1,100 reviews, and that she was also a Yelp Elite, whose user account was closed. Complaint ¶¶ 24-26; Facchetti Decl., ¶ 3, Exhibit A, ¶ 17. Plaintiff Walchesky alleges that he is domiciled in Pittsburgh, Pennsylvania, has written over 1,200 reviews, as well as 238 follow-up and updated reviews, and has taken and submitted 2,122 photographs. Complaint ¶ 27.

Plaintiffs claim they are entitled to compensation because Yelp has published their reviews, photos, and other content contributions online. However, each of the Plaintiffs submitted their content pursuant to Yelp's Terms of Service, which did not provide any expectation of being compensated for that content. Ms. Sayers and Ms. Jeung were subject to additional terms as members of the Yelp Elite Squad. Facchetti Decl. ¶ 3, Exhibit A, ¶¶ 16-17. Based on these agreements, it is clear that Plaintiffs voluntarily used Yelp's free services to publish their content. They could not have had a reasonable expectation of being paid for their submissions.

E. Class Allegations

Plaintiffs in all claims, pursuant to the FLSA, 29 U.S.C. §216, on behalf of themselves and all similarly situated persons, were employees of Defendant, and were not paid wages for their work published on Defendant's website; each performed duties relating to the creation and promotion of content on behalf of Defendant, including but not limited to writing researching, editing, lodging reviews, upgrading prior reviews, and generally promoting the site, during the period between four years prior to the filing of this Complaint and until the date of final adjudication of this action (the "FLSA Class"). Complaint ¶ 35.

F. Documents Incorporated by Reference and Necessarily Relied on by Plaintiffs in the Complaint

1 Plaintiffs refer to, and rely upon specific Terms and other disclosures
 2 displayed on Yelp's website to support their allegations. Those documents and
 3 disclosures include Yelp's Frequently Asked Questions, Terms of Service, Content
 4 Guidelines, and Elite Squad Terms of Membership. Due to these allegations, the
 5 Court may treat the contents of the documents as part of the Complaint, and
 6 assume that their contents are true for purposes of this motion.

7 **III. PROCEDURAL HISTORY**

8 Plaintiffs brought the same claims against Yelp in a previous action that was
 9 filed on October 22, 2013, and served on October 25, 2013. The action was
 10 stylized: *Panzer, et al. v. Yelp, Inc.*, USDC Case No. CV13-07805-DDP (JCGx).
 11 Judge Pregerson dismissed the case, without prejudice, on February 19, 2014.

12 Plaintiffs filed their Complaint in this new action on August 7, 2014.
 13 Plaintiffs served Yelp with their Complaint on September 26, 2014. Dkt. No. 1.
 14 Conference of counsel, pursuant to L.R. 7-3, took place on October 10, 2014 by
 15 mail and e-mail. Facchetti Decl., ¶ 10.

16 **IV. RULE 12(b)(6)**

17 **A. Legal Standard**

18 Under Rule 8(a), a complaint must contain a "short and plain statement of
 19 the claim showing that the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). If a
 20 complaint fails to do this, the defendant may move to dismiss it under Rule
 21 12(b)(6). Fed R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint
 22 must contain sufficient factual matter, accepted as true, to 'state a claim that is
 23 plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation
 24 omitted). A claim is plausible on its face "when the plaintiff pleads factual content
 25 that allows the court to draw the reasonable inference that the defendant is liable
 26 for the misconduct alleged." *Id.* "Factual allegations must be enough to raise a
 27 right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550
 28 U.S. 544, 555 (2007). Thus, there must be "more than a sheer possibility that the

1 defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. “Where a complaint
 2 pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short
 3 of the line between possibility and plausibility’” that the plaintiff is entitled to
 4 relief. *Id.*

5 In ruling on a motion to dismiss for failure to state a claim, a court should
 6 follow a two-pronged approach: (1) first, discount conclusory statements, which
 7 are not presumed to be true; and then, assuming any factual allegations are true, (2)
 8 determine “whether they plausibly give rise to entitlement to relief.” *See id.* at 679;
 9 *see also Chavez v. U.S.*, 683 F.3d 1102, 1108 (9th Cir. 2012). In making this
 10 determination, a “court may consider evidence on which the complaint ‘necessarily
 11 relies, if: (1) the complaint refers to the document; (2) the document is central to
 12 the plaintiff’s claim; and (3) no party questions the authenticity of the copy
 13 attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
 14 2006). *See also United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir.
 15 2011). A court may treat such a document as “part of the complaint, and thus may
 16 assume that its contents are true for purposes of a motion to dismiss under Rule
 17 12(b)(6).” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

18 **B. Plaintiffs’ FLSA Claim Fails Because They Have Not Alleged**
 19 **Sufficient Facts To Plausibly Establish That They Are—Or Ever**
 20 **Were—Employees Of Yelp Under the Ninth Circuit’s Four-**
 21 **Factor “Economic Reality” Test**

22 Under the FLSA, the standard by which an employer/employee relationship
 23 exists is judged by the “economic reality” of the parties’ relationship. *Bonnette v.*
 24 *California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983);
 25 *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009) (*citing Goldberg v.*
 26 *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)). To determine the
 27 “economic reality,” the Ninth Circuit applies a four-factor test that considers
 28 whether the alleged employer: (1) had the power to hire and fire the employees, (2)

1 supervised and controlled employee work schedules or conditions of employment,
 2 (3) determined the rate and method of payment, and (4) maintained employment
 3 records. *See Lambert v. Ackerley*, 180 F.3d 997, 1001-02, 1012 (9th Cir. 1999);
 4 *Bonnette*, 704 F.2d at 1470. Applying the above test, there is no doubt that
 5 Plaintiffs failed to allege sufficient facts to state a plausible claim under the FLSA.
 6 We analyze each factor in turn below.

7 **1. There are no factual allegations establishing that Yelp had the**
 8 **power to hire or fire any of the Plaintiffs.**

9 **a. No facts were alleged to demonstrate that any of the**
 10 **Plaintiffs were hired.**

11 Plaintiffs allege that Yelp hired them. Complaint ¶¶ 20, 24, 27. But there are
 12 no facts to support their conclusion. *See In re Gilead Sciences Securities Litig.*, 536
 13 F.3d 1049, 1055 (9th Cir. 2008) (court is not required “to accept as true allegations
 14 that are merely conclusory . . .”) Plaintiffs do not allege facts regarding a hiring
 15 process, a start date, an employment contract, or any other information that would
 16 indicate an actual employment relationship. Nor do Plaintiffs identify a person or
 17 persons who hired the Plaintiffs, and whether the unnamed hirer had the authority
 18 or power to do so on Yelp’s behalf. Indeed, Plaintiffs do not allege an
 19 understanding, let alone an agreement that they would be paid to use Yelp’s free
 20 website.

21 Instead, they seem to advance the theory that voluntarily using a free service
 22 equates to an employment relationship. Severely undermining this theory,
 23 however, and making it all the more implausible, is the fact that the agreements
 24 referenced in the Complaint plainly state that Plaintiffs are *not* employees. The
 25 Elite Terms¹ state: “You understand that you are not an employee, representative,

26
 27 ¹ While Plaintiffs scrubbed all explicit references to the Yelp Elite squad in the
 28 Complaint, the previous lawsuit repeatedly referred to it, and alleged that Sayers
 and Jeung were “Elite” reviewers. Facchetti Decl., ¶ 3, Exhibit A, ¶¶ 16-17, 39-40,
 51; *compare with* Complaint ¶¶ 20, 49, 55, 68. Indeed, in an apparent effort to

1 or agent of Yelp. You agree that you will not represent yourself as an employee,
 2 representative, or agent of Yelp.” Facchetti Decl. ¶ 9, Exhibit G, ¶ 7. The TOS
 3 states: “THE SITE IS MADE AVAILABLE TO YOU ON AN “AS IS”, “WITH
 4 ALL FAULTS” AND “AS AVAILABLE” BASIS, WITH THE EXPRESS
 5 UNDERSTANDING THAT THE YELP ENTITIES MAY NOT MONITOR,
 6 CONTROL OR VET USER CONTENT. AS SUCH, YOUR USE OF THE SITE
 7 IS AT YOUR OWN DISCRETION AND RISK.” *Id.* at ¶ 7, Exhibit E. ¶ 12.A. The
 8 lack of any facts demonstrating that Plaintiffs were hired, together with the
 9 agreements, makes it clear that no plausible employment relationship exists. *See*
 10 *Williams v. Strickland*, 87 F.3d 1064, 1067 (9th Cir. 1996) (“Williams had neither
 11 an express nor an implied agreement for compensation with the Salvation Army
 12 and thus was not an employee.”); *Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734, 739-
 13 741 (S.D.N.Y. 2012) (dismissing state law equitable claims of “unpaid content
 14 providers” because “plaintiffs submitted their materials to The Huffington Post
 15 with no expectation of monetary compensation and that they got what they paid
 16 for—exposure in The Huffington Post”), *aff’d*, 505 Fed. Appx. 45 (2d. Cir. 2012).

17 **b. No facts were alleged that establish Plaintiffs Sayers or**
 18 **Jeung could have been fired.**

19 Plaintiffs Sayers and Jeung allege that they were “fired,” presumably
 20 because Yelp closed their free accounts. Complaint ¶¶ 22, 26. But terminating an
 21 individual’s ability to access a free website where they voluntarily post information
 22

23
 24 avoid a motion to dismiss, in lieu of using the term “Elite reviewer,” they use the
 25 term “model reviewer.” *Id.* at ¶¶ 20, 49, 55, 68; *Chateau Hip, Inc. v. Gilhuly*, No.
 26 95 Civ. 10320 (JGK), 1996 WL 437929, at *6 (S.D.N.Y. Aug. 2, 1996) (“—[T]hat
 27 more complete allegations have been deliberately omitted from the Second
 28 Amended Complaint to avoid a motion to dismiss raises serious questions as to the
 good faith basis for a claim....”). The Court should thus determine that the
 previous allegations are party admissions for purposes of the present motion. *See*
Warren v. Fox Family Worldwide, Inc., 171 F. Supp. 2d 1057, 1060 n.5 (C.D. Cal.
 2001) (plaintiffs’ allegations in prior pleading are party admissions).

1 does not mean they were “fired.” Plaintiffs’ allegations merely describe the
 2 termination of their free user accounts for violating Yelp’s terms, actions that are
 3 entirely consistent with their status as users, rather than employees. Facchetti Decl.
 4 ¶ 7, Exhibit E, ¶ 14.

5 Plaintiffs’ failure to allege any plausible facts showing that Yelp had the
 6 ability to hire or fire them, much less facts showing any employment agreement—
 7 implicit or explicit—supports the economic reality that Plaintiffs are *not* Yelp’s
 8 employees under the FLSA. *Strickland*, 87 F.3d at 1067.

9 **2. There are no plausible allegations that Yelp exercised supervision**
 10 **or control over Plaintiffs.**

11 There are no plausible allegations that Yelp ever controlled Plaintiffs’ work
 12 schedules, working conditions, equipment, or any other component of a legitimate
 13 employment relationship. Instead, Plaintiffs make a number of spurious allegations
 14 to create the false appearance that Yelp maintained control. These allegations can
 15 be broken down into four categories, and are analyzed below.

16 First, Plaintiffs allege that Yelp must exercise control over the Plaintiffs
 17 because it exercises control over its actual employees. Complaint ¶¶ 6, 13, 31.
 18 However, this ignores the distinction between those whom Yelp actually employs
 19 (software engineers, salespeople, community managers, and accountants), and
 20 those whom it does not—individuals who simply use the services that Yelp
 21 provides and have never entered into any employment relationship with Yelp. The
 22 allegations that Yelp controls the work of its actual employees (including their pay
 23 and work schedules) simply does not plausibly support a conclusion that Yelp
 24 therefore must control the Plaintiffs.

25 Although Plaintiffs frequently aver that Yelp designates “workers” or
 26 “employees” as “reviewers” or ‘Yelpers’ or ‘independent contractors’ or ‘interns’
 27 or ‘volunteers’ or ‘contributors,’” these labels are irrelevant, since there is no
 28 allegation that Yelp used terms such as “employee,” “intern,” or “independent

1 contractor” in relation to the Plaintiffs. Complaint ¶¶ 9, 12, 82. Similarly, the fact
2 that Yelp recruits interns (who are paid) does not mean that Yelp hired any
3 Plaintiff as an intern. Complaint ¶ 79.

4 Second, Plaintiffs allege that Yelp exercises control by encouraging users to
5 use its website (Complaint ¶ 32), educating users about its website (*id.* at ¶¶ 53, 55-
6 58), and managing the use of its website through written Terms (*id.* at ¶¶ 63-64).
7 But there is no allegation that Yelp required Plaintiffs to use its website at all,
8 much less that Yelp supervised or scheduled the creation of their content or its
9 posting on Yelp’s website. Nor is it alleged that Yelp required Plaintiffs to create
10 website content at a certain location or using certain equipment, or otherwise
11 forced Plaintiffs to submit any website content at all to Yelp.

12 On the contrary, the Complaint merely recites that Yelp—consistent with its
13 role as an online forum, educates its end-users about how to use its websites,
14 “urges” the use of its services, and maintains and enforces its Terms and other
15 policies once users post content to Yelp’s website. For example, the Complaint
16 vaguely asserts, without factual basis, that Yelp “urges” and “directs” individuals
17 to write reviews for its website. Complaint ¶¶ 21, 25, 28, 58. Plaintiffs also allege
18 that Yelp—like any online business—generally encourages consumers to use its
19 website. *Id.* at ¶¶ 53-56. However, these allegations of encouragement do not
20 plausibly translate into any type of actual control of the Plaintiffs, and only reflect
21 Yelp’s own efforts to publicize its website to consumers like Plaintiffs.

22 Plaintiffs also repeatedly take issue with the fact that Yelp promulgates
23 Terms and policies relating to online content, and once content is posted to its
24 website, may enforce those Terms and policies to correct violations (including
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1 account closures & content removal). Complaint ¶¶ 62-64.² But Plaintiffs’ alleged
 2 grievances are not the complaints of employees, but the gripes of end-users of
 3 Yelp’s free services that disagree with the way Yelp administers its websites.
 4 Complaint ¶ 73 (“I loved Yelp until I got an email from them saying they have
 5 taken off my photos due to the pictures being my ‘personal experience’ and that
 6 the reason behind taking off my photos is because it does not ‘portray the business
 7 as a whole.’”) citing Content Guidelines (“Photo Guidelines”), Facchetti Decl., ¶ 8,
 8 Exhibit F.

9 Moreover, Yelp’s Terms make clear that Plaintiffs alone owned, and were
 10 ultimately responsible for, the submission of their own content. Terms of Service,
 11 Facchetti Decl., ¶ 7, Exhibit E. Section 5(A) (“You alone are responsible for Your
 12 Content, and once published, it cannot always be withdrawn. You assume all risks
 13 associated with Your Content, including anyone’s reliance on its quality, accuracy,
 14 or reliability . . . You may not imply that Your Content is in any way sponsored or
 15 endorsed by Yelp.”); Section 5(C) (“As between you and Yelp, you own Your
 16 Content.”); Section 12(A) (“THE SITE IS MADE AVAILABLE TO YOU ON
 17 AN “AS IS”, “WITH ALL FAULTS” AND “AS AVAILABLE” BASIS, WITH
 18 THE EXPRESS UNDERSTANDING THAT THE YELP ENTITIES MAY NOT
 19 MONITOR, CONTROL OR VET USER CONTENT. AS SUCH, YOUR USE OF
 20 THE SITE IS AT YOUR OWN DISCRETION AND RISK.”). Such disclosures
 21 further demonstrate that while Yelp, obviously, has control over its own websites,
 22 it has no control over Plaintiffs’ themselves.

23 Plaintiffs’ next category of allegations relate to “motivational rewards”
 24 implicit in Yelp’s website itself, such as publicly noting when a user is the “First to
 25

26 ² Plaintiffs speculate that Yelp took action on posted content and user accounts to
 27 specifically benefit advertisers. Such allegations are conclusory and incorrect, but
 28 are also irrelevant and appear intended solely to harm Yelp’s reputation.

1 Review” a particular business, or when a user “checks-in” extensively to a certain
 2 establishment through Yelp’s mobile applications. Complaint ¶ 53. These
 3 allegations, though, merely describe Yelp’s website itself and highlight some
 4 features that may drive Yelp’s popularity with the Plaintiffs and users like them.
 5 Such allegations cannot show any plausible form of employer control over the
 6 Plaintiffs any more than the “motivational reward” in getting the high score in a
 7 video game suggests that the game’s manufacturer employs its players.

8 Plaintiffs’ fourth set of allegations describing the Yelp Elite squad program,
 9 also does not establish any employment relationship. Complaint, ¶¶ 29, 31, 49, 53,
 10 54, 64. The fact that some of the Plaintiffs once participated in this program,
 11 enjoyed the perks of such participation, and continued using Yelp’s free services in
 12 efforts to keep participating, does not create an employment relationship with
 13 Yelp. The Yelp Elite program is analogous to participation in an airline frequent
 14 flyer program. Simply because the airline urges such participants to use their
 15 services, rewards them for doing so with special privileges and status (free drink
 16 coupons, entry to the airport club, early boarding), and may remove such status in
 17 its own discretion, does not transform the participants into employees of the
 18 airline. Furthermore, the Elite Terms explicitly state that members of the Elite
 19 squad are not employees of Yelp, cutting against any expectation of an
 20 employment relationship. Elite Terms, Facchetti Decl., ¶ 9, Exhibit G, ¶ 7.

21 **3. The allegations that Yelp offered free promotional items are**
 22 **insufficient to establish that it determined rates and methods of**
 23 **payment.**

24 First, Yelp never determined rates or methods of payments with respect to
 25 the Plaintiffs because no payments were ever made, nor were such payments ever
 26 contemplated.

27 Second, Plaintiffs allege that Yelp distributes free promotional items to the
 28 public such as, “liquor, food, badges, trinkets, and titles.” Complaint ¶ 60. These

allegations do not establish that Yelp determined a method of payment. Rather, the distribution of these items is a marketing device that is employed by Yelp to market its website. This form of marketing is common and is employed by virtually every service provider. In any event, there is no allegation that these freebies were given in return for any specific work, or for any other reason than for Yelp to promote itself and its services to the public.

4. The allegations are insufficient to establish that Yelp maintained employment records

Plaintiffs do not allege that Yelp maintains employment records on their behalf. Only the Terms and related documents are alleged in the complaint, which, of course, undermine Plaintiffs' claim.

C. The "Relative Nature of the Business" Test Does Not Apply in This Case

In the Complaint, Plaintiffs rely on the "relative nature of the business" test to support their claim that they are employees of Yelp. Complaint ¶¶ 76-81. While Plaintiffs would fail this test as well, Plaintiffs' reliance is misplaced as this is the wrong test. The "relative nature of the business" is one of six factors identified by courts as useful in distinguishing an "employee" from an "independent contractor" for purposes of the FLSA. *See Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). These tests are inapplicable here because Yelp has never identified Plaintiffs as "independent contractors" (nor has this been alleged), and Plaintiffs are neither independent contractors nor employees of Yelp.

V. RULE 12(f)

A. Legal Standard

Rule 12(f) allows the court to "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." *See also Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973-974 (9th Cir. 2010). Where the complaint

demonstrates that a class action cannot be maintained on the allegations at the pleading stage, courts have relied on Rule 12(f) to strike class allegations at an early stage of a lawsuit. *See Lyons v. Bank of Am.*, 2011 WL 6303390, at *7 (N.D. Cal. Dec. 16, 2011) (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517. *See also Stearns v. Select Comfort Retail Corp.*, 2009 WL 4723366, at *15-16 (N.D. Cal. Dec. 4, 2009); *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009) (addressing the use of Rule 12(f) and noting that “[w]here the complaint demonstrates that a class action cannot be maintained on the facts alleged, a defendant may move to strike class allegations prior to discovery.”); *Brazil v. Dell, Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008).

B. The Allegations Do Not Define An Ascertainable Class.

Courts have held that a class must be adequately defined and clearly ascertainable before a class action may proceed. *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679-680 (S.D. Cal. 1999). *See also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718 (9th Cir. 2007). A class definition should be “precise, objective and presently ascertainable.” *O’Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). “An adequate class definition specifies ‘a distinct group of plaintiffs whose members [can] be identified with particularity.’” *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 593 (E.D. Cal. 2008) (quoting *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Plaintiffs fail to meet their burden of defining an ascertainable class. They allege that they were “employees of Defendant, and were not paid wages for their work published on Yelp’s website; each performed duties relating to the creation and promotion of content on behalf of Defendant, including but not limited to writing, researching, editing, lodging reviews, upgrading prior reviews, and generally promoting the site,” and that the class consists of those who are similarly

1 situated to them. Complaint ¶ 35. Plaintiffs’ allegations are insufficient to
2 objectively identify an ascertainable class.

3 *First*, each Plaintiff’s claim depends upon his or her individual
4 circumstances and unique interactions with Yelp. Plaintiffs allege—without factual
5 support—that they had “duties,” (Complaint ¶ 35) but there is considerable
6 variation among Plaintiffs themselves, and among Plaintiffs and other consumers
7 of Yelp’s websites regarding at least: each of their respective individualized
8 communications or interactions with Yelp; each of their individualized content
9 contributions posted to Yelp (for example whether, and how, Yelp imposed
10 “duties” of content creation in relation to each particular contribution, and whether
11 each particular contribution conformed to Yelp’s Terms); and the respective state
12 of mind of each of the individual users of Yelp’s websites regarding their
13 relationship with Yelp (for example, did a Yelp user somehow feel forced to
14 perform “duties” of content contribution, or did the user simply like to use Yelp’s
15 free website).

16 *Second*, as described above, named Plaintiffs’ claims to be “employees” are
17 implausible legal conclusions. Identifying the class as “employees” necessitates the
18 question of whether an employer/employee relationship exists under FLSA
19 between Yelp and each of the tens of millions of rank and file users of Yelp’s
20 online services—relationships that Yelp denies exists and which the allegations of
21 the Complaint do not support, even for the named Plaintiffs. It is impossible to
22 ascertain which individuals could possibly be included in this putative “class” of
23 “employees” when there are no uniform facts demonstrating an
24 employee/employer relationship for each user of Yelp’s free websites.

25 Consequently, Plaintiffs’ purported class action allegations should be
26 stricken. This Court should exercise its discretion to strike Plaintiffs’ spurious
27 allegations relating to its proposed unascertainable class. *See Fantasy, Inc.*, 984
28 F.2d at 1527.

1 **VI. CONCLUSION**

2 The defects in the Complaint are many and incurable. Plaintiffs have been
3 given ample opportunity to allege sufficient facts to demonstrate valid claims—
4 indeed it is telling that after nearly a year and two lawsuits—they are unable to do
5 so. Plaintiffs should not be permitted to subject Yelp to another round of expensive
6 motion practice on the theory, fine as far as it goes, that leave to amend should be
7 freely dispensed. For the reasons stated above, the Complaint should be dismissed
8 with prejudice and the class actions stricken.

9
10 DATED: October 16, 2014 LAW OFFICES OF ADRIANOS FACCHETTI, P.C.
11

12
13 By: /s/ Adrianos Facchetti
14 Attorneys for Defendant,
15 YELP INC.
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(PROOF OF SERVICE – 1013A(3), 2015.5 CCP)

STATE OF CALIFORNIA)
) SS.
 COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 301 E. Colorado Blvd, Suite 514., Pasadena, CA 91101.

On October 17, 2014 I served the foregoing document(s) described as YELP INC'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(b)(6) AND TO STRIKE CLASS ALLEGATIONS PURSUANT TO RULE 12(f); MEMORANDUM OF POINTS AND AUTHORITIES on the interested parties in this matter by placing X a true copy the original thereof enclosed in a sealed envelope addressed as follows:

Attorney for Plaintiffs

Daniel A. Bernath, Esq.
 10335 SW Hoodview Drive
 Tigard, OR 97224

Courtesy Copy:

Daniel A. Bernath, Esq.
 1319 Kingswood Ct.
 Ft Myers, Florida 33919

(BY MAIL) X I placed a true copy of the foregoing document(s) in a sealed envelope addressed to each interested party as set forth above. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service made pursuant to CCP § 1013(a) should be presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

(FEDERAL) X I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on October 16, 2014 at Pasadena, CA.


 Reagan Hyland